

**THE MICHIGAN JUDICIAL INSTITUTE  
WELCOMES YOU TO THE...**

***Ex PARTE* COMMUNICATION TRAINING  
SEMINAR FOR COURT SUPPORT PERSONNEL**

April 26, 2006  
Michigan Hall of Justice  
Lansing, Michigan



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Commission on Law Enforcement Standards (MCOLES).

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Mr. Jon Ferrier has been a Referee with the Family Division of the 17<sup>th</sup> Circuit Court in Grand Rapids since 1981. He is also an Honorary Lifetime member of the Friend of the Court Association and a current member of the State Bar Committee on Professional and Judicial Ethics. Mr. Ferrier founded the Domestic Relations Education Programs in the Grand Rapids area which provide a monthly presentation and discussion of issues in domestic relations. These sessions are free of charge and are open to the public and attorneys working in the field.

Mr. Ferrier received his B.A. from John's College in Annapolis, MD. He received his J.D. from Wayne State University in Detroit. He has served as faculty for the Institute for Continuing Legal Education and the State Bar of Michigan on numerous occasions. He Also served on the faculty of Davenport University from 1989 – 1993 where he instructed paralegals in Family Law.

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## *Ex Parte* Communication: A Training Seminar For Court Support Personnel

Before we begin the seminar:

- Complete the pre-test.
- Complete the voluntary demographic form.
- Help yourselves to hot coffee, tea or water.

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## *Ex Parte* Communication: A Training Seminar For Court Support Personnel

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## Definitions of *Ex Parte* Communication

- Black's Law Dictionary: "On one side only; by or for one party; done for, in behalf of, or on the application of, one party only."
- MJI's Handbook of Legal Terms: "A communication between the court and one party of a lawsuit, made without prior notice to any other party."

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## Introduction to Judicial Discipline

- What is a judge?  
"Judge means: (1) a person who is serving as a judge of an appellate or trial court by virtue of election, appointment, or assignment; (2) a magistrate or a referee;..." MCR9.201 (B)(1)-(3)
- "A judge must not independently investigate facts in a case and must consider only the evidence presented." Commentary to Model Canon 3B(7)

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## Intro to Judicial Discipline con't.

- "A judge must make reasonable efforts, including the provision of appropriate supervision to ensure that the rule [of *ex parte* communication] is not violated through law clerks or other personnel on the judge's staff." Commentary to Model Canon 3B(7)

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## Rules of *Ex Parte* Communication for 'Pending' or 'Impending' Cases

- No matter how pure the intent;
- No matter how conscientious a party is;
- No matter the actual effect on the case;
- No matter how much you try to discuss "hypothetical situations"...

***Ex Parte* Communications are  
not allowed!**

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### Allowable *Ex Parte* Communications

Canon allows certain *ex parte* communications:

- For scheduling, administrative, or emergencies if disclosed
- Expert advice, with disclosure to parties
- Judge may consult with court personnel (one way street?)
- "Shuttle diplomacy" with consent of all parties
- When authorized by law - examples

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### Prohibited *Ex Parte* Communications

- The adjudicative officer initiates the *ex parte* communication.
- The communication is intended to influence the outcome of a case.
- You cannot act as an advocate for a party with the adjudicative officer involved in the case.

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### Why Forbidden?

- Due process considerations
  - Is the communication purely procedural and not substantive?
- Actual bias or appearance of bias
  - It deprives the absent party of his/her right to be heard and comment.
- Creates more work for the court and staff
  - May require a new trial.

*Always consider your communication with any adjudicative officer.*

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Beware of any “helpful” communication with an adjudicative officer.

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## Case Examples

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## After an *Ex Parte* Communication

- Statutory responsibilities
- Ethical responsibilities

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## Guidelines for Court Support Personnel

You may refer to the following when discussing a case with an adjudicative officer:

- Scheduling
- Administrative Purposes
- Emergencies – as defined by adjudicative officer
- Not on substantive matters
- No party will gain a tactical or procedural advantage

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## Question & Answer

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## Conclusion

- Complete post-test.
- Complete evaluation.
- Leave post-test, evaluation, and demographic form at your table.
- Discard garbage on your way out.
- Thank you!

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### **CANON 3: A Judge Should Perform the Duties of Office Impartially and Diligently**

The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply:

#### **A. Adjudicative Responsibilities:**

1. A judge should be faithful to the law and maintain professional competence in it. A judge should be unswayed by partisan interests, public clamor, or fear of criticism.
2. A judge may require lawyers, court personnel, and litigants to be appropriately attired for court and should enforce reasonable rules of conduct in the courtroom.
3. A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.
4. **A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows:**
  - a. **A judge may allow ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits, provided:**
    - the judge reasonably believes that no party or counsel for a party will gain a procedural or tactical advantage as a result of the ex parte communication, and
    - the judge makes provision promptly to notify all other parties and counsel for parties of the substance of the ex parte communication and allows an opportunity to respond.
  - b. **A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.**
  - c. **A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.**
  - d. **A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.**
  - e. **A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.**
5. A judge should dispose promptly of the business of the court.
6. A judge should abstain from public comment about a pending or impending proceeding in any court, and should require a similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court or the judge's holdings or actions.
7. A judge should prohibit broadcasting, televising, recording, or taking of photographs in or out of the courtroom during sessions of court or recesses between sessions except as authorized by the Supreme Court.
8. A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but the judge should bear in mind that undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on the judge's part toward witnesses, especially those who are excited or terrified by the unusual circumstances of a trial, may tend to prevent the proper presentation of the cause, or the ascertainment of truth in respect thereto.



Conversation between the judge and counsel in court is often necessary, but the judge should be studious to avoid controversies that are apt to obscure the merits of the dispute between litigants and lead to its unjust disposition. In addressing counsel, litigants, or witnesses, the judge should avoid a controversial manner or tone.

A judge should avoid interruptions of counsel in their arguments except to clarify their positions, and should not be tempted to the unnecessary display of learning or a premature judgment.

9. A judge should adopt the usual and accepted methods of doing justice; avoid the imposition of humiliating acts or discipline, not authorized by law in sentencing and endeavor to conform to a reasonable standard of punishment and not seek popularity or publicity either by exceptional severity or undue leniency.
10. Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect. To the extent possible, a judge should require staff, court officials, and others who are subject to the judge's direction and control to provide such fair, courteous, and respectful treatment to persons who have contact with the court.

#### **B. Administrative Responsibilities:**

1. A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.
2. A judge should direct staff and court officials subject to the judge's control to observe high standards of fidelity, diligence, and courtesy to litigants, jurors, witnesses, lawyers, and others with whom they deal in their official capacity.
3. A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware. However, a judge is not obliged to take or initiate disciplinary measures on the basis of information gained while serving with the substance abuse counseling program of the State Bar of Michigan, to the extent the information would be protected under MRPC 1.6 from disclosure if it were a communication between lawyer and client.
4. A judge should not cause unnecessary expense by making unnecessary appointments. All appointments shall be based upon merit.
5. A judge should not approve compensation beyond the fair value of services rendered.

**C. Disqualification:** Judge should raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under MCR 2.003(B).

**D. Remittal of Disqualification:** A disqualification of a judge may be remitted as provided by MCR 2.003(D).



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# JUDICIAL CONDUCT REPORTER

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## After an Ex Parte Communication *by Cynthia Gray*

Despite a judge's best efforts to avoid ex parte contact, a judge may inadvertently be exposed to an inappropriate communication concerning a proceeding outside the presence of the parties. Such a communication does not necessarily disqualify the judge from the case although he or she may not consider the communication. The judge should, however, disclose the communication and take steps to ensure that the

breach is not repeated.

An ex parte communication does not automatically result in the disqualification of the judge. A contrary rule would allow a party to remove a judge from a case by initiating an ex parte contact, which would encourage unethical ploys and allow manipulation of the judicial process.

The Alabama judicial ethics advisory committee addressed an inquiry from a judge who had received an ex

parte communication from a relative of a party in a case. *Alabama Advisory Opinion 99-720*. The individual had come to the judge's office and insisted on speaking with him about a hypothetical question. Overhearing the difficulty a staff person was having in getting the person to understand that the judge could not talk, the judge went to tell the person himself. The person im-

*(continued on page 8)*

## Interim Suspension

Many states have provisions that require or authorize the temporary suspension of a judge with pay while disciplinary or criminal proceedings are pending against that judge.

In several states, a recommendation for the judge's removal from office or other serious sanction automatically triggers a suspension with pay. For example, a provision in Arizona states: "A judge is disqualified from acting as a judge, without loss of salary, while there is pending . . . a recommendation to the supreme court by the commission on judicial conduct for his sus-

pension, removal or retirement." Alaska, California, Connecticut, Indiana, Minnesota, Missouri, Montana, North Dakota, South Dakota, and Washington have similar provisions

In some states, an order of the supreme court is required to suspend a judge following a recommendation of removal. In Nebraska, "upon order of the Supreme Court, a Justice or Judge of the Supreme Court or other judge shall be disqualified" while a recommendation for removal or retirement is pending. In Arkansas, the supreme court "may" suspend a judge with pay while a com-

mission recommendation for removal or voluntary disability retirement or articles of impeachment are pending. In Vermont, the supreme court may suspend a judge when review of a recommendation of suspension for misconduct or disability is pending. In Kansas, a panel of the commission may recommend to the supreme court that a judge be temporarily suspended from performing judicial duties pending final disposition of a recommendation for discipline or compulsory retirement.

*(continued on page 6)*

## After an Ex Parte Communication *(continued from page 1)*

mediately blurted out an allegation of fact relevant to the case. The judge disclosed the incident on the record in the case. The judge told the advisory committee he felt no bias toward or against either party as a result of the incident.

The committee stated that actions toward or statements to a judge by a party or a party's relative during a judicial proceeding "do not cause the judge to be disqualified unless the judge is actually influenced and develops a personal bias or prejudice as a result." To hold otherwise, the committee reasoned, "would allow litigants and their friends and relatives to control judicial proceedings whenever dissatisfied with the course of the proceeding."

Therefore, a judge is not disqualified following:

- A letter or inquiry from a legislator on behalf of a constituent (*Virginia Advisory Opinion 00-7*).
- A communication from a non-party who is a friend of the judge (*U.S. Compendium of Selected Opinions*, § 3.9-2 (2001)).
- An ex parte contact authorized by the Domestic Abuse Act (*Nebraska Advisory Opinion 98-1*).
- An attorney's attempt to make an ex parte communication, which the judge's quick response prevented (*Illinois Advisory Opinion 93-1*).
- A councilman's unsuccessful attempt to speak privately with the judge on behalf of a party (*New York Advisory Opinion 92-81*).

### Disqualification

Disqualification may be required following an ex parte communication,

however, if additional circumstances give rise to an appearance of bias. A judge's initiation of an ex parte communication, for example, may indicate a bias that requires disqualification.

For example, the Florida Court of Appeal prohibited a trial judge from further participation in custody proceedings based on the judge's ex parte communication with the father. During a hearing on the father's contempt motion regarding visitation, the trial judge had the parties removed from the courtroom while he spoke to the child. The judge met with the father

and child without the attorneys or the mother present. The judge then held the mother in contempt.

Stating that "because of its effect on the appearance of impartiality . . . an allegation of an ex parte communication is legally sufficient to require recusal," the court concluded that the mother's allegation of an ex parte communication alone adequately established a reasonable basis to fear that she would not receive a fair hearing in subsequent proceedings. The court also noted the trial judge's expressed desire to "punish" the mother with a change of custody. *Pearson v. Pearson*, 870 So. 2d 248 (Florida Court of Appeal 2<sup>nd</sup> District 2004). *See also State v. Leslie*, 666 P.2d 1072 (Arizona 1983) (new trial required when trial judge in murder case solicited contact with relatives of the victim after

jury returned guilty verdict and made telephone contact with two relatives before pre-sentence hearing); *Fletcher v. Commission on Judicial Performance*, 968 P.2d 958 (California 1998) (where judge admitted personal feelings about propriety of granting diversion based on ex parte communications with defendant's family and defendant's comment that diversion was "a done deal," judge should have disqualified from sentencing decision, not just disclosed communications); *In re Disqualification of Calabrese*, 798 N.E.2d 10 (Ohio 2002) (allegation of ex parte communication supported by something more than hearsay constitutes grounds for disqualification if communication was initiated by judge or addressed substantive matters).

### Disclosure

Even when a judge is not required to disqualify, a judge should disclose to the parties any ex parte or other improper communications. For example, the Washington ethics advisory committee addressed an inquiry from a judge who had read a leaflet that was placed on the windshields of all the cars in the courthouse parking lot about a case concerning the death of a child by a drunk driver over which the judge was presiding. The committee advised that "to avoid the appearance of impropriety the judicial officer should provide all parties with a copy of the leaflet." *Washington Advisory Opinion 96-12*.

Similarly, a judge must disclose an unsolicited letter from an out-of-state judge seeking leniency for a criminal defendant about to be sentenced and a

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**Even when a judge is not required to disqualify, a judge should disclose to the parties any ex parte communications.**

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letter written to a judge by a bar association concerning a pending proceeding. *California Advisory Opinion 45* (1997).

Several advisory committees have described the appropriate procedure when a judge receives a letter from an unrepresented litigant or a prisoner. The Virginia advisory committee stated that after receiving a prisoner's letter attempting to communicate privately, a judge may:

- Give the letter to the court clerk to be file-marked and retained in the file,
- Send a copy to the prosecuting attorney and retained or court-appointed defense counsel, and
- Read the letter to determine whether it is a proper or improper ex parte communication (in other words, whether it falls within one of the exceptions to the prohibition on ex parte communications).

*Virginia Advisory Opinion 99-5*. If the communication is proper, the judge should disclose it and allow the parties


to respond. If it is improper, the judge should communicate in writing (which may be a form letter) to the prisoner, with a copy filed with the clerk and sent to the prosecuting attorney and defense counsel. The judge's response should state that:

- The letter was improper,
- Such communication should cease,
- The judge will take no action in response to the letter, and
- A copy of the letter has been sent to the prosecuting attorney and defense counsel.

*Accord Texas Advisory Opinion 154* (1993) (copies of correspondence should be sent to counsel and any pro se litigants).

Similarly, the Washington judicial ethics committee stated that a judge may respond to a letter or other written communications from an unrepresented criminal defendant with a form letter, sent by the court clerk. *Washington Advisory Opinion 02-14*. The

form letter would advise the defendant that the judge cannot respond to questions and that the defendant should contact a lawyer or schedule a hearing in accordance with the court rules. If a judge receives a communication from a defendant who is represented, the judge may advise the defendant to contact his or her lawyer. Copies of both the defendant's letter and the judge's response should be retained in the court file and given to counsel.

A similar form reply may be sent in response to an ex parte communication from a defendant's spouse, parent, or other relative or friend. *Washington Advisory Opinion 02-14*. See also *Massachusetts Advisory Opinion 03-17* (in response to letter stating complaining witness in criminal complaint over which judge had presided had heard nothing about progress of case, judge may tell writer where he may learn what has happened but should send copies of both letters to prosecutor and to defense counsel). 

## Interim Suspension *(continued from page 7)*

come of criminal proceedings, many states have provisions automatically suspending the judge with pay or authorizing the court or commission to order the judge's disqualification with pay.

Those states in which disqualification is automatic include Alabama, Alaska, Arizona, California, Connecticut, Minnesota, Missouri, Montana, North Dakota, Ohio, Rhode Island, and South Dakota. Following criminal charges, in Nevada, the commission "shall" suspend the judge, while in Hawaii, Indiana, and Nebraska, the supreme court "shall" order the suspension of a judge immediately without necessity of commission action. In other states, the supreme court "may" suspend the judge following a recommendation by the conduct commission (Arkansas, Kentucky, Louisiana) or

without commission action (New York, South Carolina, Tennessee) or the commission may suspend the judge (Georgia, Kentucky, Texas, Vermont, Wyoming). In Utah, an indicted judge is placed on administrative leave without pay by a member of the supreme court. In West Virginia, disciplinary counsel may make a report regarding temporary suspension to the supreme court of appeals. In Pennsylvania, the Judicial Conduct Board makes a motion for an interim suspension with the Court on Judicial Discipline. In Illinois, a chief judge may temporarily assign a judge to restricted duties or duties other than judicial duties when the judge has been formally charged with a crime that involves moral turpitude or reflects adversely upon the judge's fitness to serve.

In most states, the suspension results from an indictment or an infor-

mation charging the judge in the United States with a crime punishable as a felony under a state or federal law. Additional crimes may also result in suspension in Arkansas and Hawaii (misdemeanor charges that adversely affect the judge's ability to perform the duties of office), Connecticut and Wyoming (a crime involving moral turpitude), Louisiana ("any other lesser crime that reflects adversely on the judge's honesty, trustworthiness or fitness as judge"); South Carolina ("a serious crime"), Texas (a "misdemeanor involving an act relating to a judicial office or a misdemeanor involving an act involving moral turpitude"), Utah ("class A misdemeanor"), and West Virginia ("a serious offence"). 